IN THE

Supreme Court of the United States

October Term, 1957

No. 547 452

OLETA O'CONNOR YATES,

Petitioner,

vs.

UNITED STATES OF AMERICA.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

MARGOLIS, MCTERNAN & BRANTON,
By BEN MARGOLIS,
112 West Ninth Street,
Los Angeles 15, California,
Attorneys for Petitioner.

The Myers Legal Press, Los Angeles. Phone VAndike 9007.

SUBJECT INDEX

PAGE

III.

IV.

TABLE OF AUTHORITIES CITED

MISCELLANEOUS

STATUTES

INDEX TO APPENDICES

IN THE

Supreme Court of the United States

October Term, 1955

No. .....

OLETA O'CONNOR YATES,

Petitioner,

vs.

UNITED STATES OF AMERICA.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

To the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Oleta O'Connor Yates respectfully petitions that a writ of certiorari issue to review a judgment of the United States Court of Appeals for the Ninth Circuit which affirmed an "order, judgment and certificate of criminal contempt" made by a trial judge in the District Court for the Southern District of California, Central Division, adjudging petitioner guilty of eleven separate criminal contempts.

Opinions Below.

The opinion of the Court of Appeals (App. A) is not yet reported. No written opinion was rendered by the trial judge in this particular proceeding.[1]

Jurisdiction.

The judgment of the Court below (App. B) is dated, and was entered, on July 26, 1955. A petition for rehearing was duly filed, and denied, on November 2, 1955. The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254.

Questions Presented.

1. Whether refusal on the same grounds to answer a series of questions on the same subject and of the same character in the same trial may be treated as separate contempts and separately punishable, in the light of the provisions of 18 U. S. C., Section 401, the Congressional purpose in the enactment of the said statute, the double jeopardy provisions and the due process provisions of the Fifth Amendment.

2. Whether the decision and judgment of the Court below holding that the trial judge was empowered to impose a punitive punishment of imprisonment for one year

---

[1]There were four related judgments and orders entered by the trial judge against this petitioner in different contempt proceedings arising solely out of petitioner's refusal to answer certain questions during her cross-examination in the Los Angeles Smith Act trial, *United States v. Yates, et al.* Determination of the legal issues here requires a consideration of these companion proceedings as well as an appraisal of the proceedings in the criminal trial, now on file in this Court after the grant of Certiorari on October 17, 1955. *Yates, et al. v. United States,* Nos. 308, 309, 310. These matters are detailed hereafter in the Statement of the Case.

in proceedings whose character and purpose were essentially coercive and remedial were contrary to law, the provisions of 18 U. S. C., Section 401, and deprived petitioner of her liberty without due process of law in violation of the due process provisions of the Fifth Amendment.

3. Whether the sentence of one year imprisonment imposed upon petitioner under the circumstances herein was contrary to law and policy in the administration of justice in summary contempt proceedings and so unnecessarily severe, grossly excessive and arbitrary as to constitute a manifest abuse of discretion, cruel and inhuman punishment and a deprivation of petitioner's liberty without due process of law in violation of the due process provisions of the Fifth Amendment and the provisions of the Eighth Amendment.

4. Whether the imposition of the sentence of one year imprisonment by the trial judge on the unlawful, irrelevant and extraneous grounds that petitioner after trial and discharge of the jury continued in her refusal to answer the inquiries propounded during her cross-examination for the benefit of the prosecution in some possible future trial, deprived petitioner of her liberty without due process of law contrary to the due process provisions of the Fifth Amendment, and voided the sentence and judgment of contempt.

Statutes and Rules Involved.

The pertinent provisions of 18 U. S. C., Section 401 and Rule 42 of the Federal Rules of Criminal Procedure are set forth in Appendix G hereof.

Statement of the Case.

A. The Criminal Trial—How the Contempt Proceedings Arose.

In order to focus the legal issues here, it is necessary to appraise initially the circumstances out of which the contempt proceedings arose.

On December 21, 1951, an indictment was returned against this petitioner and thirteen other defendants charging a conspiracy to violate certain provisions of the Smith Act (18 U. S. C., 371, 2385). Trial under this indictment commenced on or about February 1, 1952. The prosecution rested its affirmative case on May 21, 1952 [R. 8659].[2]

The evidence adduced by the prosecution in support of its affirmative case purported to establish that the principles of Marxism-Leninism were the equivalent of the advocacy of the forcible overthrow of the Government, that the Communist Party advocated and taught the aforesaid principles, and that the petitioner and her co-defendants were members and officers of the said Party.

Through documentary evidence and the oral testimony of numerous witnesses, the prosecution in its affirmative case placed before the jury its proof that petitioner and her co-defendants were members and officers of the Party during the period charged in the indictment. It is pertinent here to note that among the co-defendants were the following persons: Frank Spector, Al Richmond, Dorothy Healey, Ernest Fox and Albert Jason Lima.

---

[2]The reference "R." is to the Reporter's Transcript of Proceedings in the criminal trial on file in this Court, *Yates et al. v. United States,* Nos. 308, 309, 310.

The witnesses also testified during the prosecution's affirmative case that they had attended Party meetings and classes where they had heard certain statements made by other members and officials of the Party. Among such persons identified by the prosecution witnesses as members and officials of the Party were: Harry Glickson [R. 443-5]; Leon Kaplan [R. 4481, 5440-4]; Ida Rothstein [R. 4424-26]; Herschel Alexander [R. 7617-27]; and Celeste Strack [R. 5519-20].

At the conclusion of the prosecution's affirmative case, ten of the defendants rested their cause. Among these ten, were the five defendants aforementioned [R. 10,074-77]. Petitioner and three other defendants, did not rest. Petitioner took the stand and testified in her own defense.

The petitioner in her direct testimony [R. 10,159-11,170] made no attempt to contradict in any way the identification by the prosecution witnesses of the aforesaid persons as members and officers of the Party.[3] Petitioner limited her testimony to her own understanding of the principles and programs of the Party and the principles of Marxism-Leninism. Petitioner stated on her direct examination, during a discussion of the role of the State in Marxist theory, that she had witnessed or read of many acts of violence and terrorism against members of the Communist Party by vigilante groups and local police officials [R. 10469-80; Ex. JA, R. 10220-36; Ex. JT, R. 10453-80; Ex. LS, R. 10504-17; Exs. LU and LV, R. 10517-20], and that "in order to protect the lives,

---

[3]This portion of the prosecution's testimony went uncontradicted throughout the trial, and was not disputed in counsels' summations to the jury.

the families, the jobs and the welfare of these people there are many times and many people who cannot publicly announce their political affiliations however much they would like to do so" [R. 10,517].

Petitioner having concluded her direct examination was subjected to a lengthy cross-examination concerning her knowledge and understanding of the principles of Marxism-Leninism, to all of which she answered fully and at length [R. 11,228-740, 11,853-72]. During her cross-examination, petitioner was asked if she knew the aforementioned co-defendants who had rested and the third party declarants who had been identified as members and officers of the Communist Party as aforesaid. Whenever asked, petitioner acknowledged that she knew such persons and the length of time she had known them. She declined only to identify them as members of the Party, although she never denied that they were [R. 11310-15, 11619-33]. The Court instructed the jury at the conclusion of the trial, without objection, that "the fact that the defendant Yates refused to answer certain questions may be considered by the jury in determining the weight and credibility of her own testimony." 106 F. Supp. 906, 929. There was a verdict of guilt and judgment of conviction in the principal cause.

B. The First Contempt Proceeding.

No question of active misbehavior or even rudeness or discourtesy is involved herein. There was no physical obstruction of the trial proceedings. When the issue was first raised on the opening day of petitioner's cross-examination (June 26, 1952), she stated that her declination was based solely on her unwillingness to cause the individual "the loss of his job, his income and perhaps

be subjected to further harassment, and in a period of this character, where there is so much witch-hunting, so much anti-communism, I am sorry I cannot bring myself to contribute to that" [R. 11312]. Petitioner then stated: "However many times I am asked and in however many forms, to identify a person as a communist I can't bring myself to do it, because I know it means loss of job, I know that it means persecution for them and their families, I know that it even opens them up to possible illegal violence, and I will not be responsible for that. I will not do it" [R. 11315].

That these initial statements were expressions of conscience and so understood by the District Court is clear from the record. The trial judge stated: "The witness does not want to be an informer" [R. 11351]. "The jury undoubtedly understand what it is to be put under the obligation to inform on others. They may feel that they would do the same thing" [R. 11337].

The prosecution urged upon the trial judge a holding that petitioner was in contempt of court and requested a coercive order [R. 11346-47]. This was on the first day of cross-examination. The petitioner had been asked whether she knew Harry Glickson [R. 11310], who had been identified by prosecution witnesses as a member of the Party. Petitioner answered that she did know the said Glickson, and had known him since the early 30's [R. 11310]. She was then asked if she had known Glickson to be a member of the Party [R. 11,312]; upon declining to answer for the aforestated reasons, if it were not true that Glickson during the years 1945 and 1946 had been an active chairman of a communist club in San Francisco [R. 11,313]; and again, upon declining to answer for the same reasons, whether Glickson was in

1950 an active member of the Communist Party [R. 11,314]. Petitioner also declined to answer an inquiry which sought to elicit the same identification of the defendant Spector [R. 11,318-19]. As has been noted, the said defendant Spector had previously rested his case without denial of the testimony of prosecution witnesses who had identified him as a member and officer of the Party.

At the conclusion of the aforesaid first day of cross-examination, the trial judge held that in declining to answer the four questions as discussed above, petitioner had committed four separate offenses of contempt of court. Petitioner was immediately committed to the custody of the United States Marshal "to be by him imprisoned in a jail type institution until you have purged yourself of your contempt by answering the questions ordered to be answered in each instance or until further order of the Court" [R. 11,372-73]. On the next day, a formal judgment was entered by the trial judge entitled "Judgment, Order and Commitment of Civil Contempt" [R.-27, p. 3.][4] Petitioner was thereafter confined in jail during the remainder of her cross-examination and until the termination of the trial, a period of about 43 days.

It will be helpful to this Court, it is respectfully submitted, to pursue these initial contempt proceedings to their conclusion. Petitioner was committed for her "civil contempt" on June 26, 1952. On August 6, 1952, the jury returned its verdict of guilt in the principal cause.

---

[4]In the Court of Appeals, the transcript of the record in this initial "civil contempt" proceeding was numbered 13527, and has been filed with this Court in order to facilitate the appraisal of the subsequent contempt proceedings arising out of the same subject matter. The reference to this transcript is "R.-27."

On August 7, 1952, sentence was imposed. Bail pending appeal from the judgment of conviction in the principal cause was denied by the trial court. The Court of Appeals remanded with directions to the District Court to fix the amount of bail. Upon remand, bail was again denied by the District Court. On August 29, 1952, the Court of Appeals itself fixed bail in the sum of $20,000 pending appeal. On August 30, 1952, petitioner furnished the said bail before another Judge, then sitting temporarily in the District Court, but the United States Marshal advised the said Judge that he was holding petitioner pursuant to the judgment of civil contempt, and that he could not release petitioner without an order of the court. Petitioner was permitted to furnish the $20,000 bail and ordered released upon her stipulation that she would appear before the trial judge on the question of the "civil contempt" [R.-27, p. 11].

On September 3, 1952, petitioner appeared before the trial judge. In the view of the trial judge, the Government was still "entitled to the benefit of the old answers . . . the purpose in civil contempt is to coerce the witness . . . the purpose is to get her testimony . . . the purpose of coercion is to compel the answer to the question . . . the Government is a litigant in the case, for whose benefit the coercive power of the court is exercised on the witness to compel the answers . . . the Court of Appeals may order a new trial . . . there are coercive powers to compel the witness to do what she should have done when she was on the witness stand . . . It isn't a punitive matter . . . as long as the proceedings are pending, and if there is any purpose to be gained by the testimony, by any litigant entitled to it, it seems to me that the power of the court continues . . ." [R.-27, pp. 29-41].

Petitioner was "ordered back into physical custody of U. S. Marshal pursuant to order of June 26, 1952, *re* civil contempt" [R.-27, p. 12].[5] On September 4, 1952, petitioner surrendered to the Marshal and was returned to jail. This was about 30 days after the conclusion of the trial. Petitioner had previously been in custody about 65 days.

On September 5, 1952, the Court of Appeals stayed execution of the aforesaid order, and ordered petitioner's release on bail pending appeal from the said order [R.-27, pp. 47-8]. Petitioner was finally released on September 6, 1952, after furnishing the said bail.

The Court of Appeals reversed. The opinion is unreported (App. D).[6] The Court held that the order directing petitioner's return to custody was improvidently granted because "it was error to attempt to coerce this witness into testifying before a jury which had been disbanded and could not be legally recalled" (App. D, p. 23). The Court expressed the view that "there is no essential dichotomy between 'civil' and 'criminal' contempt"; that "a fixed term or an indefinite one which might last longer seems to make no distinction of practical value to a prisoner"; that "even the unexpressed purpose of the judge to coerce or punish is no test"; that "if we become involved in the bog of signification of phrases, the clear way will be lost" (App. D, pp. 18-19). Judge Stephens concurred only in the result (App. D, p. 23).

---

[5]The District Court's written opinion appears in 107 F. Supp. 408 (App. C).

[6]All of the separate contempt proceedings were heard and determined by the Court of Appeals at the same time.

C. The Second Contempt Proceeding—Multiplication of Offenses.

After the petitioner had been imprisoned at the conclusion of the first day of her cross-examination (June 26, 1952) as aforesaid, her cross-examination continued thereafter uneventfully until about the third day of her cross-examination (June 30, 1952), when towards the conclusion of the day, the trial judge remarked: "She has been under cross-examination, this is the third day, Mr. Neukom, I expect you to be somewhere near the conclusion of it" [R. 11,616]. The cross-examination up to this point, since the events of the first day, had been directed to petitioner's knowledge and understanding of the principles of Marxism-Leninism, matters which she had brought out on direct. The day's session was coming to a close. The prosecutor anticipated "going the remainder of tomorrow" [R. 11,616]. The Court stated: "You are wasting time now" [R. 11,616]. Whereupon, the prosecutor brought the day's session to a close by a series of inquiries, asking the petitioner to identify Kaplan, Rothstein, Alexander, Richmond, Healey, Spector (name previously asked on the first day), Fox, Lima and Strack [R. 11,619-33]. As previously noted, all of these persons were co-defendants or third party declarants, identified by prosecution witnesses as members of the Party, a fact never put in issue by petitioner or any other defendant.

Petitioner admitted, whenever asked, that she knew these persons and testified as to the length of the time she knew them [R. 11,620, 11,621, 11,622, 11,633]. The petitioner stated however that she could not identify these persons as Communists. "I am sorry I can't for the same

reasons that I advanced last week" [R. 11,618]. "This is again the same question, and if you ask it in 20 different forms, if the content is the same, my answer must be the same" [R. 11,620].

At the conclusion of the day's session, and after the jury had been excused, the trial judge stated: "I expect to treat the contempt of the court committed by the defendant Yates in today's session as criminal contempt pursuant to Rule 42(a). That is my present inclination, and deal with them independently as far as punishment is concerned" [R. 11,634]. Upon request of counsel, immediate action was deferred [R. 11,634-35]. Subsequently, and on July 8, 1952, during the trial, the trial judge filed an "Order, Judgment and Certificate of Criminal Contempt" [R.-41, pp. 3-15].[7] The order recites eleven specifications and includes only the refusals to answer on the third day of cross-examination (June 30, 1952).

As noted, on August 6, 1952, the jury returned its verdict of guilt in the principal cause and the jury was discharged. On August 7, 1952, sentence of five years imprisonment and fine of $10,000 was imposed on petitioner. On August 8, 1952, petitioner was brought before the District Court for the purpose of determining what punishment should be imposed for failure to answer the eleven additional questions of June 30, 1952. Before imposing sentence the trial judge stated, among other things: "I had hoped by this time that Mrs. Yates might be willing to purge herself; that she might be prompted

---

[7]The Transcript of Record in this proceeding was numbered 13541 in the Court of Appeal, and is referred to here as "R.-41." This transcript is being filed in this Court together with this petition for writ of certiorari, the judgment in this proceeding being the one under review.

to do so" [R. 44, p. 27]. The judge stated that he "might treat answers now to the questions as a vindication of judicial authority and treat it [the contempt] as purged" [R. 41, p. 28]. "I take it from the defendant's statement that she is as adamant now as she was the day the questions were put" [R.-41, p. 28]. "Now, the Government was entitled on cross-examination to show, if they could, that that person whom Mrs. Yates impliedly said was a very foolish person[8] was a friend of Mrs. Yates . . . We do not know. That is the problem, we do not know; . . ." [R.-41, p. 32]. "I hope Mrs. Yates will yet purge herself . . . If she at any time within 60 days, while I have the authority to modify this sentence under the Rules, wishes to purge herself, I will be inclined even at that late date to accept her submission to the authority of the Court" [R.-41, p. 37].

The sentence of the trial judge on August 8, 1952, was imprisonment for one year for "each of the eleven separate contempts" [R.-41, p. 17], the sentences on each count to run concurrently and to commence following petitioner's release from custody following execution of the five-year sentence of imprisonment [R.-41, pp. 17-18].

The Court of Appeals affirmed the judgment. The Court stated: "These eleven questions, each of which was propounded upon June 30, constitute incidents separate and distinct from the first four" (App. A, p. 2). "In this proceeding, there was no attempt at coercion to

---

[8]Mrs. Yates' testimony regarding the meaning of Marxism-Leninism had varied sharply from statements attributed to the third party declarant.

require the answers" (App. A, p. 3). "The sentence was severe. Its control is not in our province. It certainly indicates no abuse of discretion" (App. A, p. 8).

D. The Third Contempt Proceeding—Further Post-trial Coercion.

When petitioner was finally released on bail pending appeal on September 6, 1952, from the order directing her return to confinement for failing to answer the first four questions, she was again told by the then sitting judge that the trial judge desired her presence before him on September 8. Petitioner appeared before the trial judge on the said day, some thirty days after the conclusion of the trial. Petitioner learned for the first time that the trial judge proposed to punish her failure to answer the first four questions of June 26 as criminal contempts. The trial judge stated before imposing sentence: "The Court invoked equitable powers to attempt to force you to answer at that time, Mrs. Yates, but that has apparently been unsuccessful. Do you wish to answer the questions at this time? . . . You could end it very simply, Mrs. Yates, by answering the questions" [R.-35, p. 50].[9]

The sentence of the trial judge was imprisonment for three years "for your refusal to answer the four ques-

---

[9]The Transcript of Record in the Court of Appeals was numbered 13535, and is referred to here as "R.-35." The transcript has been filed with this Court in order to enable it to appraise the validity of the aforesaid one year "criminal contempt" judgment which was affirmed by the Court of Appeals.

tions concerning Harry Glickson and Frank Spector," the sentences to run concurrently [R.-35, p. 52]. The written opinion of the trial judge is reported in 107 F. Supp. 412 (App. E). Upon imposing sentence, the judge stated: "I may say, Mrs. Yates, before you leave the bar, that at any time during the period I have jurisdiction to do so, if you are disposed to purge yourself of this contempt and obey all lawful orders of the court, I will entertain a motion to modify any one, not only this sentence [three years], but any other of the sentences heretofore imposed in the other criminal contempt proceeding [one year] which is No. 22,379 on the records of this Court" [R.-35, p. 53]. To the protests of counsel, the judge replied that "in view of the indication the court has given, Mrs. Yates still has the keys to the jail in her own pocket" [R.-35, p. 55].

Petitioner was returned to custody on September 8.[10] The Court of Appeals ordered her release on her own recognizance pending appeal. Petitioner was released on September 11. Thus, shuttling in and out of jail, peti-

---

[10]The trial judge appeared determined after trial to incarcerate the petitioner as a means of coercing her answers. Petitioner had been released on bail after trial pending her appeal from the judgment of conviction in the criminal trial; she had been released on bail pending appeal from the order directing, after trial, her return to custody on the civil contempt of June 26, 1952; the one year sentence of imprisonment for the alleged contempt of June 30, 1952, was to commence after the five year sentence on the Smith Act conviction had been served. Only after these events had transpired, when it appeared that the petitioner was still at liberty, did the trial judge impose a three year sentence of imprisonment for failure to answer the four questions propounded on the first day of cross-examination, June 26, 1952.

tioner had been confined pursuant to the three contempt orders in all about 70 days.

On November 12, 1952, the trial judge, having previously requested the Court of Appeals to remand the judgment for the said purpose, entered an "Order Supplementing 'Certificate, Order and Judgment on Contempt' *nunc pro tunc* as of September 8, 1952" [R.-35 pp. 63-4]. It was ordered that the provisions of the judgment be supplemented by the additional order that the 3 year term of imprisonment follow upon petitioner's release from custody following execution of the five year sentence, and run concurrently with the 1 year contempt sentence. It was further ordered "that if and when, at any time prior to the defendant's release from custody following execution of the concurrent three-year sentences of imprisonment herein imposed, the defendant shall purge herself of contempt by answering under oath the questions as provided in the 'Judgment, Order and Commitment in Civil Contempt' entered June 26, 1952, in proceeding No. 14291—Civil in this court, and shall be declared so purged by order of this court in said proceeding numbered 14291, then the four concurrent three-year terms of imprisonment herein imposed shall *ipso facto* cease and terminate" [R.-35, p. 60].

The Court of Appeals reversed. The written opinion is unreported (App. F). The Court stated: "This situation is complex. To overcome the refusal of the defendant in a criminal case to answer these four questions, the court had committed her. While upon the wit-

ness stand during this confinement, Mrs. Yates had refused to answer eleven other questions of a similar nature, and was thereupon sentenced to imprisonment for a year as a punishment. This conviction has been upheld. It was expressly decided there that the two occasions were separate and distinct and different corrective and punitive measures were within the competence of the court" (App. F, p. 31).

The Court of Appeals adopted only one of the many grounds for invalidating the three year summary contempt judgment. The Court held that "the notions inherent" in due process of law "will not permit, without prior positive notification, what otherwise might be viewed as the indefinite confinement of a defendant in a criminal case pending his submission as a witness to authority, and then, when imprisonment has had no effect, the punishment of the refusal of obedience by incarceration for a term of years" (App. F, p. 34). The Court noted: "Since proceedings in contempt are *sui generis*, here the whole course of action in the criminal trial and all subsequent proceedings must be apprised" (App. F, p. 34, note 5).

ARGUMENT.

A.

The Court of Appeals has rendered a decision in conflict with decisions of the Court of Appeals, and so far departed from the accepted and usual course of judicial proceedings, and so far sanctioned such a departure by the District Court, as to call for an exercise of this Court's power of supervision.

I.

The Separate Judgment of Contempt Rendered Against Petitioner for Refusal to Answer Similar Questions for the Same Reasons Upon the Third Day of Cross-Examination Was Illegal and Void, Deprived Petitioner of Her Liberty Without Due Process of Law and Placed Petitioner Twice in Jeopardy for the Same Offense, All Contrary to Law and to the Due Process and Double Jeopardy Provisions of the Fifth Amendment.

The gist of the ruling of the court below upholding the contempt judgment here involved is the alleged separateness of the offenses of the first and third days of cross-examination. "Those eleven questions, each of which was propounded upon June 30, constitute incidents separate and distinct from the first four" (App. A, p. 2).

That the object and purpose of the eleven questions propounded on the third day of cross-examination were the same as those propounded on the first day is clear from the record [R.-27, pp. 3-7; R.-41, pp. 3-14]. That the questions were similar is conceded by the court below. "While upon the witness stand during this confinement,

Mrs. Yates had refused to answer eleven other questions *of a similar nature,* and was thereupon sentenced for a year as punishment" (App. F, p. 31) (emphasis supplied). That the "separateness" of the offenses was not bottomed upon the differences in individuals is also plain. On the initial day, the first three questions treated as separate contempts were all designed to obtain the identification as a Communist of one Harry Glickson [R.-27, pp. 3-6]. The fourth question treated as a contempt with respect to Frank Spector [R.-27, pp. 6-7] was similar in nature to the one propounded on the third day with respect to the same individual, and also treated as a separate contempt [R.-41, pp. 10-11]. Also, on the third day, the first three questions of the same import, concerned one person, Kaplan [R.-41, pp. 3-5], all treated as separate contempts. Moreover, it is conceded that the grounds for refusal to answer the particular questions were the same as those advanced initially by the petitioner on the first day of her cross-examination, when she stated she would answer no questions of that character (App. A, pp. 5-7).

The issue as thus presented to this Court is whether, in conformity with the requirements of the fundamental law, a court may continue to punish as separate contempts refusal by a witness to answer repeated questions involving the same subject matter, where the subsequent questions are of the same nature as those initially propounded and the grounds for refusal to answer the same as those initially advanced. If the views of the courts

below be adopted, it would be theoretically possible for an astute interrogator, by a suitable variation of his questions, to produce a result under which the alleged contemptuous witness might be imprisoned for the balance of her life, particularly if the sentences were made to run consecutively. As the Statement of the Case makes evident, this was precisely the direction in which the trial judge here was headed.

The determination of the issue must be made in the light of the Congressional purpose in the enactment of 18 U. S. C., Section 401. The court below appeared to be of the view that "the power of the court [to punish for contempt] is inherent and can only be removed when the court is abolished" (App. D, p. 18). It has been held, however, that Congress has the constitutional authority to curtail this "inherent" contempt power. *Nye v. United States,* 313 U. S. 33; *In re Michael,* 326 U. S. 224; Frankfurter & Landis, *Power of Congress over Procedure in Criminal Contempts in "Inferior" Federal Courts,* 37 Harv. L. Rev. 1010 (1924). The grant of this drastic power is to be grudgingly construed. The power is to be used sparingly. *Gompers v. Buck's Stove & Range Co.,* 221 U. S. 418, 451; *Anderson v. Dunn,* 6 Wheat. (U. S.) 204, 231. A rule of law which would open the door to widespread abuses of the contempt power similar to those which led to so much public clamor and condemnation of judges in the past would appear to be contrary to the plain legislative purpose in the enactment of 18 U. S. C., Section 401.

The decision of the court below, sanctioning the multiplication of offenses, is in direct conflict with the decisions of Courts of Appeals in other circuits on the same matters.

United States v. Orman, 207 F. 2d 148, 160 (C. A. 3, 1953); *United States v. Costello*, 198 F. 2d 200, 204 (C. A. 2, 1952). The decision is also in conflict with the decisions of lower federal courts which have passed on the same issues. *United States v. Emspak*, 95 F. Supp. 1012, 1014 (D. C. D. C., 1951); *United States v. Yukio Abe*, 95 F. Supp. 991, 992 (D. C. Haw., 1950). The decisions of the state courts are also to the contrary on the same question. *Fawick Airflex Co. v. United Electrical, R. & M. Wk'rs.*, 92 N. E. 2d 431, 436 (Ohio App., 1950); *People v. Amarante*, 104 N. Y. S. 2d 807 (N. Y. App. Div., 2d Dept., 1951), 100 N. Y. S. 2d 677, 681 (N. Y. Sup. Ct., Sp. Term, 1950), 100 N. Y. S. 2d 463 (N. Y. Sup. Ct., Sp. Term, 1950); *Maxwell v. Rives*, 11 Nev. 213, 221 (1876). See also *Note*, 29 Chicago-Kent L. Rev. 348-51 (1951).[11]

No such theory of the power to punish for contempt as was advanced by the courts below can be accepted, it is respectfully submitted, in the light of express constitutional inhibitions and the historical events which led to the enactment of 18 U. S. C. 401 by Congress. When the petitioner on the first day of her cross-examination made her position clear, the prosecution could not multiply the contempts, and the court the punishments, by continuing to ask petitioner questions each time eliciting the

---

[11]The rationale of these decisions finds support in other contempt cases where similar issues were involved. *United States v. Universal C. I. T. Credit Corp.*, 344 U. S. 218; *Lawson and Trumbo v. United States*, 176 F. 2d 49, 51 (C. A. D. C., 1949); *McGovern v. United States*, 280 Fed. 73 (C. A. 7, 1922); *State ex rel. Parker v. Mouser*, 208 La. 1093, 1104, 24 So. 2d 151, 155 (1945); *Gautreaux v. Gautreaux*, 220 La. 564, 574, 57 So. 2d 188, 191 (1952); *State ex rel. Schoenhausen v. King*, 47 La. Ann. 701, 17 So. 288 (1895).

same answer: her refusal to identify persons as members of the Communist Party. The refusal was total on June 26 when petitioner stated that she would not identify persons as members of the Communist Party no matter how many times she was asked, and the refusals to answer eleven similar questions for the same reasons on the third day of her cross-examination could not be considered as anything more than expressions of her intention to adhere to her earlier statements and as such were not separately punishable.

In short, there was not more than one contempt committed by petitioner; the contempt occurred, if at all, on June 26, 1952, the first day of cross-examination; the imposition of punishment for the offense exhausted the sentencing power of the court; the refusal to answer similar questions on the same grounds on the identical subject matter on the third day of cross-examination did not constitute a contempt of court separately punishable; and the trial judge was without power or jurisdiction to impose a sentence of one year imprisonment for such alleged "separate" offense.

This Court should review, it is respectfully submitted, the important constitutional and legal questions here presented. The extent of the power of lower federal courts to impose punishment for contempt is peculiarly within the province of this Court to determine. Since "judicial supervision of the administration of criminal justice in the federal courts implies the duty of establishing and maintaining civilized standards of procedure and evidence" (*McNabb v. United States*, 318 U. S. 332, 340), the importance of granting certiorari herein seems manifest, it is submitted.

B.

The Court of Appeals has decided a federal question in a way in conflict with applicable decisions of this Court.

II.

Assuming Arguendo That the Refusal to Answer Similar Questions on June 30 Constituted Separate Contempts, the Trial Judge Was Without Power to Impose Punitive Punishment in Proceedings Essentially Civil in Character and Purpose.

This Court has uniformly held that where it is evident that the dominant purpose of the contempt proceedings is to coerce the contemnor to peform an act principally for the benefit of a party litigant, the proceedings are in civil contempt and punitive punishment may not be imposed. *Penfield Co. v. Sec. & Ex. Comm'n*, 330 U. S. 585; *Maggio v. Zeitz*, 333 U. S. 56; *Lamb v. Cramer*, 285 U. S. 217; *Gompers v. Buck's Stove & Range Co.*, 221 U. S. 417; *Doyle v. London Guar. & Acc. Co.*, 204 U. S. 599; *Bessette v. W. B. Conkey Co.*, 194 U. S. 324; *Hendrye v. Fitzpatrick*, 19 Fed. 810, 812 (C. C. D. Mass., 1884).

The Court of Appeals stated in one of the companion proceedings here: "Even the unexpressed purpose of the judge to coerce or punish is no test" (App. D, p. 18). Whatever validity such statement of legal principle may have in the abstract, it is inapposite here. Here the purpose of the trial judge to coerce the answers was made manifest throughout all the various contempt proceedings during and after the criminal trial. In all the post-trial proceedings,—in the proceedings when the petitioner was ordered returned to jail under the judgment of civil con-

tempt [R.-27, pp. 21-45]; in the proceedings when the petitioner was sentenced to imprisonment for one year [R.-41, pp. 22-37]; in the proceedings when the petitioner was sentenced to three years [R.-35, pp. 21-57]—the trial judge constantly emphasized that the petitioner could purge herself of all contempts if she would only answer the questions, if she would only give the desired information to the Government, the plaintiff-litigant, or to the court.

It may be that the Court of Appeals confused the express purpose of the trial judge to coerce petitioner's answers to the questions with the lack of clarity in the motivations which prompted such coercive attempts after the trial had been concluded. On the one hand the trial judge appeared determined after trial to coerce the answers, as the record reveals, in order to overcome the expressed conscientious scruples of the petitioner as a test of her sincerity, and on the other hand to coerce the answers for the benefit of the plaintiff in the event a new trial was ordered in the principal cause. Almost thirty days after the trial had been concluded, the trial judge stated in a written opinion: "Thus it is clear that the answers now sought to be coerced from the defendant Yates *qua* witness have undeterminable potential value to the plaintiff in the criminal case now pending on appeal. And it is equally clear that this potential value—as yet withheld because of the contumacious conduct of the witness—will continue to exist so long as the criminal case of the United States against Yates continues in the status of pending litigation."[12] (App. C, p. 15.)

---

[12]If this premise had been accepted, the petitioner would have been in jail since September 4, 1952, and still confined.

What ever the motivations, it is clear from the record that the punishment imposed on the petitioner was intended to be remedial by coercing the petitioner to do what she had refused to do. The form and incidental effect of the proceedings may have been a vindication of the judge's authority, but the dominant purpose of all the proceedings was to coerce the answers for the benefit of prosecution and court. Under all the tests laid down by this Court in *Gompers v. Buck's Stove & Range Co.*, 221 U. S. 417, the proceedings could only be denominated civil contempt proceedings. As such, the imposition of punitive punishment was "fundamentally erroneous." *Gompers v. Buck's Stove & Range Co., supra,* p. 449.

Since the trial judge was without jurisdiction to enter the judgment of criminal contempt here involved, the affirmance of the judgment by the Court of Appeals deprives petitioner of her liberty without due process of law and should be reviewed by this Court. The strictly limited power to punish for contempt under 18 U. S. C., Section 401 may become unfettered if a trial judge who has lost the power to coerce the answers of a witness after the conclusion of a trial may revive his power thereafter in order to continue his attempt to coerce the answers by placing the gloss of a criminal contempt judgment over the post-trial proceedings or using language characteristic of criminal contempt. ". . . indirect consequences will not change imprisonment which is merely coercive and remedial, into that which is solely punitive in character, or *vice versa.*" *Gompers v. Buck's Stove & Range Co., supra,* p. 443.

C.

The decision and judgment of the Court of Appeals affirming the grossly excessive sentence of imprisonment upon petitioner for contempt of court has so far departed from the accepted and usual course of judicial proceedings, and so far sanctioned such a departure by the District Court, as to call for an exercise of this Court's power of supervision.

III.

The Sentence of One Year Imprisonment for Contempt Under the Circumstances Here Was so Harsh, Grossly Excessive and Arbitrary as to Constitute a Manifest Abuse of Discretion, Cruel and Unusual Punishment and a Deprivation of Petitioner's Liberty Without Due Process of Law in Violation of the Due Process Provisions of the Fifth Amendment and the Provisions of the Eighth Amendment.

There is no dispute that the sentence of one year here imposed for contempt of court was severe. So much is conceded by the court below (App. A, p. 8). The sole issue is whether this severe sentence was not so grossly excessive and arbitrary as to offend standards prescribed by the Constitution and the laws of the United States, as well as standards prescribed by a civilized society and legal precedents. That this Court has the power to afford relief when courts by excessive sentences exceed the bounds of power in contempt proceedings is established. *United States v. United Mine Workers of America,* 330 U. S. 258, 304; *Sacher v. Association of the Bar of the City of New York,* 347 U. S. 388. This Court noted in *Weems v. United States,* 217 U. S. 349, that the "cruel and unusual" punishment provisions of the Eighth Amend-

ment may be applicable to punishment which by its excessive length or severity may be greatly disproportionate to the offense charged (pp. 368-74).

In the determination of whether there has been an abuse of legal discretion and an infringement of constitutional principles in the case herein, this Court will undoubtedly weigh the circumstances involved in the particular proceeding, the nature and extent of the court's power in such proceeding, the standards of punishment set by legislatures and courts in proceedings and circumstances similar to the one involved herein, and the effect of the action taken by the courts below upon the fundamental rights of persons as well as the administration of justice. It is in this context, that petitioner presents to this Court the following considerations:

(a) The power of a district court to impose punishment for contempt of court of its authority is defined and limited by 18 U. S. C., Section 401. The history of the legislative enactment and the plain Congressional purpose indicates that the contempt power is to be narrowly construed, so that the instances where there is no right to a jury trial will be restricted to "bedrock cases." *Farese v. United States,* 209 F. 2d 312, 315 (C. A. 1, 1954). See, *In re Oliver,* 333 U. S. 257, 274; *In re Michael,* 326 U. S. 224, 227. Both Congress and the courts are limited in contempt cases to the use of "the least possible power adequate to the end proposed." See the prior discussion in this petition, p. 20.

(b) This Court has held that not every refusal of a witness to answer a question at a trial necessarily evokes the exercise of the contempt power. "An obstruction to the performance of judicial duty resulting from an act

done in the presence of the court is, then, the characteristic upon which the power to punish for contempt must rest. This being true, it follows that the presence of that element must clearly be shown in every case where the power to punish for contempt is exerted." *Ex parte Hudgings,* 249 U. S. 378, 383. Such clarity of proof is lacking in the case herein. As was pointed out in the Statement of the Case (pp. 4-6), the witnesses for the prosecution had identified the defendants and the third party declarants as members and officers of the Party. The petitioner on her limited direct examination never denied this evidence, and so the jury were not only free to find the fact of membership from the failure to deny, but were specifically instructed that they could draw the inference from the refusal of petitioner to answer. The cross-examination of petitioner extended for days and the prosecution was unable to claim any injury to its cause. The prosecution summed up to the jury upon the basis of an uncontradicted record. Counsel for all defendants including petitioner made no attempt to controvert the evidence concerning the Party membership of the individuals about whom the prosecution inquired. There was no interruption of the trial. A verdict of guilt was returned against all defendants. On this record, the only one injured by the failure to answer was petitioner herself.[13]

---

[13]In *United States v. Gates,* 176 F. 2d 78 (C. A. 2, 1949), defendant while on the stand introduced an exhibit into evidence in his own behalf, but declined to state who the three persons were who prepared the exhibit under his direction. The prosecution successfully maintained that the names of the persons were relevant to the inquiry for impeachment purposes. The case here was entirely different: the prosecution had itself established by evidence the Party membership of the persons involved, the petitioner did

(c) Moreover, there was no insolence or disrespect to the Court, no baseless refusal to answer. Petitioner stated initially to the trial judge that there was no intent on her part to show any disrespect for the court or for the rulings of the court or for the power or the authority of the court. "I stated what I did state because in all conscience I cannot do otherwise . . ." [R. 80, p. 11367]. The trial judge conceded that this was the only reason the petitioner declined to answer [R. 11337]. "Anyone can have an appreciation of the sportsmanlike spirit that might permit a person not to wish to be an informer" [R.-41, p. 27]. Other citizens of repute have noted the odium which attaches to the charge of "informer." *Chafee, Thirty-Five Years With Freedom of Speech* (Roger N. Baldwin Civil Liberties Foundation, 1952); *Colyer v. Skeffington,* 265 Fed. 17, 69 (D. C. Mass., 1920).

To support the harsh sentence, the Court of Appeals stated: "It is far from our thought that a trial court cannot maintain its essential authority where the deliberate defiance arises from loyalty to political confederates or the religion of communistic determinism" (App. A, p. 7). But the record does not support such inferences of abstract facts. *Cf. Stack v. Boyle,* 342 U. S. 1, 5-6. The petitioner did admit that she knew the persons named and the length of time she knew them. The petitioner

---

acknowledge she knew such persons and how long she knew them, and was ready to answer all related questions of a similar nature. In this case, the prosecution was able to go to the jury with its evidence on the issue undenied. In the *Gates* case, without the answers of defendant, the prosecution could at least argue, if the matter was at all relevant, that its impeachment proof had been blocked. It should be noted that the punishment in the *Gates* case was 30 days in civil contempt (p. 79).

also stated: "I am quite prepared to discuss anything that I did, anything that I said" [R. 80, p. 11234]. The exercise of freedom of conscience, where injury to the State is not clearly established, has always been safeguarded by this Court. *Girouard v. United States,* 328 U. S. 61; *Cantwell v. Connecticut,* 310 U. S. 296; *United States v. Ballard,* 322 U. S. 78; *West Va. State Bd. of Ed. v. Barnette,* 319 U. S. 624.

(d) Federal legislation and decisions in the federal jurisdiction emphasize that the amount of punishment to be imposed for contempt of court must be determined with great care and deliberation, in order that no injustice may be done and the restrictive policy of the law maintained. The punishment imposed must be reasonably commensurate with the gravity of the offense. While contempts in the presence of the court are not governed by statutory limitations, still the exercise of a sound legal, non-arbitrary discretion requires recognition of the fact that the most serious contempts of court not in its presence are punishable only by a maximum prison sentence of six months. 18 U. S. C., Section 402. The section "ought to have great weight in punishing criminal contempts under section 385 of 28 U. S. C. A. [now 18 U. S. C. 401]." *Ryals v. United States,* 69 F. 2d 946, 948 (C. A. 5, 1934).

That the sentence here is unwarranted, grossly excessive and arbitrary is made plain by the actions of other federal courts under circumstances far more serious to the administration of justice than in the case herein. The chart annexed hereto indicates the marked disparity in the extent of punishment between those cases and the one herein (App. H).

Even in Smith Act prosecutions, other courts have recognized the limitations on the drastic power to punish for contempt and the possible effect which severe penalties may have on the rights of an accused to testify in his own behalf. Thus, in the *Dennis* trial, Judge Medina imposed only a sentence of 30 days in civil contempt upon a defendant who failed to answer questions. *United States v. Gates,* 176 F. 2d 78 (C. A. 2, 1949). The case here presents a far less aggravated situation than in Gates. Judge Chesnut imposed a similar thirty-day sentence in the Baltimore trial [R.-41, p. 36]. Even after the trial judge acted in this case, Judge Dimock in the second New York trial imposed only a sentence similar to the one imposed by Judge Medina (N. Y. Times, Nov. 20, 1952).

Moreover, unlike other Smith Act cases, this petitioner has already spent 70 days in jail for the alleged contempt here, and this under cruel and oppressive circumstances (see Statement of the Case).[14] Yet she has been subjected to another sentence of 1 year imprisonment, a sentence which exceeds by astronomical percentages the penalties imposed by federal courts in summary contempt proceedings.

(e) In the state jurisdictions, where the dangers of the abuse of the contempt power have also been noted, statutory limitation and the imposition of lighter penalties for similar offenses are the rule. In all of the 48 states and the District of Columbia, there are only three states

---

[14]Petitioner also spent more than four months in jail prior to the commencement of the trial because of the denial of bail by the same trial judge and the failure of the trial judge to abide by the decisions of this Court. See Note, 96 L. Ed. 14, 16-17.

—New Hampshire, Rhode Island and Vermont—which set no maximum whatever for contempt punishment. Twenty-nine jurisdictions impose an overall limitation on punishment by all courts for every kind of contempt. Only 9 of these states have a maximum term of imprisonment of six months. One of these 29 jurisdictions has a maximum of three months. All the rest of the 29 states have a maximum of 30 days or less. Two of the states have no provision for imprisonment.[15]

From all of the above, it appears clear that a rule of reason and practice has been established in this country which should govern courts in imposing penalties for contempt. Under all the circumstances here, the courts below exercised an arbitrary power in imposing a sentence of 1 year imprisonment upon this petitioner. The authority to restrain the exercise of such arbitrary power rests with this Court and justice requires that the authority be exercised here, for "justice must satisfy the appearance of justice." *Offutt v. United States,* 348 U. S. 11, 14.

---

[15]Ariz. Code Ann., Par. 27-603; Conn. Gen. Stats., Sec. 7702; Dist. Col. Code, Tit. 11, Secs. 740, 756c, 774b and 933; Iowa Code Ann., Sec. 665.4; Minn. Stats. Ann., Par. 588.10; N. Y. Judiciary Law, Secs. 773 and 774; Ore. Comp. Laws Ann., Sec. 11-502; Rev. Codes of Wash., Sec. 7.20.020; Wisc. Stats., Secs. 295.14 and 295.16; Ind. Stats., Sec. 3-906; Mich. Comp. Laws, Par. 605.21; Miss. Code Ann., Par. 1656; Gen. Stats. of N. Car., Chap. 5, Sec. 4; N. Dak. Rev. Code, Tit. 27, Chap. 10; Utah Code, Tit. 10, Sec. 45-10; Nev. Comp. Laws, Sec. 8950; Ga. Code Ann., Tit. 24, Par. 2615; Code of Ala., Tit. 13, Par. 9; Ark. Stats. Ann., Tit. 34, Par. 902; Ohio Gen. Code, Sec. 12142; Tenn. Code, Sec. 10120; Code of Va., Par. 18-256; Idaho Code, Tit. 7, Par. 610; Rev. Codes of Mont., Tit. 93, Sec. 9810; Ky. Rev. Stats., Par. 432.260; Code of Laws of S. Car., Secs. 283 and 339; W. Va. Code, Sec. 360.

D.

The decision of the Court of Appeals upholding the imposition of the sentence herein upon unlawful, irrelevant and extraneous grounds is in conflict with the decisions of this Court and other Courts of Appeal on the same matters.

IV.

Since the Sentence of the Trial Judge Was Predicated Essentially Upon the Refusal of Petitioner to Answer the Questions After the Conclusion of the Trial for the Continued Benefit of the Prosecution and the Judge, the Judgment in Criminal Contempt Based on Such Unlawful and Irrelevant Considerations Was Void and Deprived Petitioner of Her Liberty Without Due Process of Law.

In *In re Gompers,* 40 App. D. C. 293, the Court in reducing the sentence in criminal contempt to 30 days for one defendant and fines of $500 each for the other two defendants, stated: "While the injunction was issued to restrain the most subtle and far-reaching conspiracy to boycott that has come to our attention, the boycott had ceased and the necessity for the injunction no longer existed at the time this case was tried below. A penalty, therefore, which would have been justifiable to prevent further defiance of the order of the court but for the settlement, would now be needless and excessive" (p. 336).

As the Statement of the Case indicates, the principal reason for the imposition of the sentence here was the view of the trial judge that the answers of the petitioner would "have undeterminable potential value to the plaintiff in the criminal case now pending on appeal" (App.

C, p. 15). The emphasis throughout all the post-trial contempt proceedings was on the withholding of "this potential value." The trial judge stated that if petitioner would "purge" herself, and answer all questions, the court would modify all the sentences it had imposed. "Mrs. Yates still has the keys to the jail in her own pocket" [R.-35, pp. 53-5]. As a matter of law, however, neither the trial judge nor the prosecution had any further interest in or right to obtain the answers propounded to petitioner on cross-examination during the trial which had previously been concluded. *Gompers v. Buck's Stove & Range Co.*, 221 U. S. 418; *Parker v. United States*, 126 F. 2d 370 (C. A. 1, 1942); *Loubriel v. United States*, 9 F. 2d 807, 809 (C. A. 2, 1925), to cite only a few of the many applicable decisions on this point. Indeed, the Court below so held (App. D).

Where there are neither parties nor subject matter before the court, there is no longer a case in which questions can be asked. The petitioner was under no further duty to testify after the jury was discharged, and she could no longer be compelled to discharge a duty which had ended. Yet it was precisely because of her failure to do that which she could no longer do nor be compelled to do that petitioner was sentenced to a term of one year imprisonment. There is nothing in the record here which would support the position that petitioner was given this harsh and grossly excessive sentence for obstructing the administration of justice. The dominant consideration in the imposition of the punishment by the trial judge was the "potential value" of the answers to the questions—"as yet withheld because of the contumacious conduct of the witness" (App. C, p. 15).

The consideration of unlawful, irrelevant and extraneous factors in the imposition of punishment for contempt violates essential principles of due process and voids the judgment of contempt. *Oates v. United States,* 223 Fed. 1013 (C. A. 4, 1915); *Gridley v. United States,* 44 F. 2d 716, 743 (C. A. 6, 1930); *Wilborn v. State,* 156 Tex. Cr. 483, 243 S. W. 2d 839 (1952). See also, *Vetterli v. United States,* 344 U. S. 872; *Yasui v. United States,* 320 U. S. 115.

Conclusion.

The petition for writ of certiorari should be granted, the writ issued, and the judgment of contempt herein reversed.

Respectfully submitted,

MARGOLIS, MCTERNAN & BRANTON,

By BEN MARGOLIS,

Attorneys for Petitioner.

APPENDIX A.

United States Court of Appeals for the Ninth Circuit.

Oleta O'Connor Yates, Appellant, vs. United States of America, Appellee. No. 13,541. July 26, 1955.

Upon Appeal from the United States District Court for the Southern District of California, Central Division.

Before: Stephens, Fee and Chambers, Circuit Judges

James Alger Fee, Circuit Judge:

On July 8, 1952, an order, judgment and certificate of criminal contempt was entered as to Oleta O'Connor Yates upon eleven specifications of refusal to respond to questions put to her on cross-examination after a direction by the court while she was a witness in the trial of the case entitled on the records of that court United States vs. Schneiderman, *et al.*, No. 22131-C.D. This certificate recited these refusals "were committed in the actual presence of the Court and were seen or heard by the Court."

After the sentence of five years in the principal case was imposed upon Mrs. Yates on August 7, 1952, in the main case in which she was a defendant (Yates vs. United States, ... F. 2d .....), she was in custody thereunder, together with the other convicted defendants. The court held a hearing on August 8, 1952, at which she was present, personally, and was represented by counsel. Based upon the "order, judgment and certificate of criminal contempt" of July 8 under 18 U. S. C. A. §401, hereinabove referred to, the court adjudged Mrs. Yates had been convicted of eleven separate criminal contempts therein set out. The defendant was thereupon committed to the custody of the Attorney General of the United States for one year for each of such contempts. These sentences were made to run concurrently with each other,

but all were made to take effect upon the release of defendant from custody following execution of the five year sentence of imprisonment imposed August 7, 1952, upon this defendant in Case No. 22,131, United States vs. Schneiderman.

Appeal was taken from this judgment of criminal contempt on August 13, 1952.

The proceedings of the court were fair and in accordance with the precedents. There was due process at every stage. When the matter came on for hearing the day after sentence in the main case, the court had power to impose appropriate sentence for the contempts specified in the order of July 8.

There was a lapse of time between the commission of the disobedience of the order in open court and the entry of the judgment establishing each refusal as a criminal contempt on July 8 and the entry of sentence on each of the contempts on August 8. It is now well established practice for the trial judge to reserve punishment of contempts by participants in a criminal trial. The dangers surrrounding such procedure are not legal in nature, but arise in policy. None was apparent here.

A point was made in the trial court that, since defendant was in custody after June 26, when she was committed, until she had given answer to four questions which were propounded to her upon that date, the time so spent should have been applied in mitigation of this punitive sentence. But that measure applied only to the four questions, as noted above, propounded on that date. These eleven questions, each of which was propounded upon June 30, constitute incidents separate and distinct from the first four. Furthermore, verdicts of guilty were

returned in the main case against Mrs. Yates and the other defendants on August 6, and she was held in jail on that charge pending sentence. The custody on the first contempt charge ended with the discharge of the jury. Neither the coercive custody on the first contempt charge nor yet confinement after verdict upon the main charge was relevant to the criminal sentences here.

The main contention of defendant is that, when this punitive sentence was imposed, it was no longer possible for defendant to purge herself because the trial had ended and that it is improper for the court to use criminal contempt as a coercive rather than a punitive proceeding.

While it is true the court did speak of his disposition to release the defendant from the adjudication of contempt on these specifications in the event she bowed to the authority of the court, this was a suggestion of grace. It must be clearly recognized that it was no longer possible for the situation to be restored so that she could testify. In another proceeding as to other contempts, the trial judge indicated his opinion that he had power to imprison defendant until the questions there were answered. In this proceeding, there was no attempt at coercion to require the answers.

The persistent and recalcitrant refusal to bow to the authority of the august tribunal, even when offered grace after the trial was over, is highly illuminating.

The next contention of defendant takes color therefrom. Defendant, notwithstanding her defiance of the orders of the court and her refusal of grace, insists that the sentence of one year is excessive and arbitrary, constitutes cruel and unusual punishment and is a denial of due process of law in violation of the Eighth and Fifth Amendments to the federal Constitution.

The defendant had been committed for coercive purposes on June 26 to compel her answers to certain questions. Four days later, while still in custody and still under cross-examination, she committed the contempts certified in this case by refusal to answer other questions. The trial judge found from her own statement in open court on the day of sentence that "she is as adamant now as she was the day the questions were put."

The processes of justice require that all witnesses in a criminal case should obey the legal orders of the court. These processes cannot function without evidence adduced by legitimate questions and answers thereto.

In our system, there is an impregnable bastion erected to protect a defendant not only against self incrimination, but even against a compulsion to testify. As long as a defendant remains within the barbican of this guarantee, protection is absolute. The prosecutor cannot comment on this silence.

All the defendants in this case except Mrs. Yates accepted this protection. She voluntarily waived it. She knew the rule. She knew if she testified in order to attempt to clear herself and the other defendants, that she would be asked if they belonged to the Communist Party.

The various suggestions now made that the questions were not material, that the failure to answer did no harm, that she and the other defendants were convicted in any event are creations of straw. Technically, the questions were proper and material.

Her own alleged reasons are of no more validity. She said:

"Well, I am quite prepared to discuss anything that I did, anything that I said, but I am not willing to provide names and identities of people other than those that I have indicated, because I believe that in the case of the other defendants their case is already rested and I would only be contributing toward adding to the prosecution case against them, and I think that that would be becoming a government informer and I cannot do that.

"* * *

"The Court: You are instructed, Madam, to answer that question.

"The Witness: I understand, your Honor. And for the reasons I have given, because I just will not be an informer, I will not play the role of a witness for the Government, and I will not add to the prosecution's case against people who have rested, who are defendants and who are putting on no further defense. I am sorry, your Honor, I cannot answer that question.

"The Court: You understand the possible consequences of your refusal to answer, I take it?

"The Witness: I am afraid I do, but the possible consequences, grim as they may be, are not as bad as going around hanging your head in shame for the rest of your life, because you will not be an informer.

"* * *

"The Witness: Well that is a question which, if I were to answer, could only lead to a situation in which a person could be caused to suffer the loss of his job, his income and perhaps be subjected to further harassment,

and in a period of this character, where there is so much witch-hunting, so much hysteria, so much anti-communism, I am sorry I cannot bring myself to contribute to that.

"* * *

"However many times I am asked and in however many forms, to identify a person as a communist, I can't bring myself to do it, because I know it means loss of job, I know that it means persecution for them and their families, I know that it even opens them up to possible illegal violence, and I will not be responsible for that. I will not do it.

"* * *

"As I stated this morning, I would again be putting myself in the role of a government informer if I were to start discussing any of the questions that pertain to defendants who have rested their case, and do not propose to put on any further defense, and for that reason I refuse to answer.

"* * *

"A. No. I am sorry I can't for the same reasons that I advanced last week. I feel that these people are in a position where my identification of them as Communists would do them an inestimable amount of damage. I am willing to give names of people whom I know I cannot hurt, but where it is a question of damaging their interests, of harming their ability to make a livelihood, of hurting their families, No.

"Q. People that are employed by the Communist Party would not be discharged, would they, by having their names revealed?

"A. People who may be employed by the Communist Party would not be discharged by having their names re-

vealed, but members of their families can suffer the results of it in many different ways.

"* * *

"Well, that, again, comes into the same category. I can be asked 500 names, and if my identification of these people who are living people who can be hurt by my public identification of them, as they can be, then I cannot answer it. I am willing to name people who may have died, whose families cannot be * * *."

It must be remembered she was being asked about persons with whom she was charged as a co-conspirator in agreement to teach and advocate the overthrow and destruction of the government of the United States by force and violence as speedily as circumstances would permit. A defendant who chooses to take the stand cannot pick and choose the questions to which he will give answer. A person accused of murder jointly with another who is alleged to have actually done the killing cannot refuse to answer as to association or acts of the latter on the ground that he would hang his head in shame if he testified for the government against a person he thought unjustly accused. The guarantee against being required to testify would be turned into a sword instead of a shield.

The court had a right to take into consideration the defiant and recalcitrant attitude of defendant in assessing the penalty. A defendant in an ordinary criminal case who attempted so to protect his confederates would be dealt with severely, and necessarily so. It is far from our thought that a trial court cannot maintain its essential authority where the deliberate defiance arises from loyalty

to political confederates or the religion of communistic determinism.

The sentence was severe. Its control is not in our province. It certainly indicates no abuse of discretion. It is true the vindication of the authority of the court would have been better subserved by an immediate commitment rather than confinement after release on the sentence in the main case. This Court has no power to control the discretion of the trial judge in this respect either.[1]

Affirmed.

(Endorsed:) Opinion. Filed July 26, 1955.

Paul P. O'Brien, Clerk.

---

[1]United States vs. Bollenbach, 2 Cir., 125 F. 2d 458, 459.

APPENDIX B.

United States Court of Appeals for the Ninth Circuit.

Oleta O'Connor Yates, Appellant, vs. United States of America, Appellee. No. 13,541.

Judgment.

Appeal from the United States District Court for the Southern District of California, Central Division.

This cause came on to be heard on the Transcript of the Record from the United States District Court for the Southern District of California, Central Division, and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this Court, that the Judgment of the said District Court in this cause be, and hereby is affirmed.

(Endorsed) Judgment.

Filed and Entered: July 26, 1955.

Paul P. O'Brien, Clerk.

APPENDIX C.

United States v. Yates. Civ. No. 14291. United States District Court, S. D. California, C. D. Sept. 3, 1952.

Mathes, District Judge.

While on trial under an indictment charging conspiracy, 18 U. S. C., §371, to violate the Smith Act, 54 Stat. 670, 1940, 18 U. S. C. 1946 ed., §10; *id.* 1948 ed., §2385, defendant Oleta O'Connor Yates chose to take the witness stand in her own defense. Upon cross-examination she declined to answer certain questions, and repeatedly persisted in her refusal after being instructed by the court to answer.

The criminal trial was interrupted and a hearing had. 85 Tr. 11325-11354, 11367-11477. Upon this hearing counsel for the defense conceded that the questions which the defendant as witness blatantly refused to answer were properly put to her, and that "unquestionably this is exclusively within the court's sound discretion." See United States v. Toner, 3 Cir., 1949, 173 F. 2d 140, 144; Fed. Rules Crim. Proc. 52(a), 18 U. S. C.

By way of justification, to paraphrase the language of United States v. Gates, 2 Cir., 1949, 176 F. 2d 78, 80, the defendant vigorously urged that the court should establish a rule of public policy to protect her from the embarrassment of disclosing the identity of certain of her associates, and to protect them from fear of economic reprisals so that activities claimed to be of a political nature might be carried on in secret.

The defendant also attempted to justify her refusal upon the claimed moral dictum that a witness should not be compelled to be an "informer" or a "stool pigeon"; that a witness should be permitted in effect to testify as the

witness might choose on direct examination, and then be permitted to decline answers on cross-examination upon the ground that the information called for was gained in confidence from friends or others and to compel disclosure would be unsportsmanlike.

Being of the opinion expressed in United States v. Gates, *supra*, 176 F. 2d at page 80, that: "Such a rule would in effect transfer from the court to the witness the management of the trial with respect to the admission and exclusion of evidence, since it would enable the witness to determine what testimony to give and what to withhold"—I ordered the defendant committed "to the custody of the * * * Marshal for imprisonment * * * until such time as she * * * purge herself of the contempts by answering the questions ordered to be answered * * *"

The criminal trial then proceeded, with the recalcitrant witness Yates continuing to testify and refusing to answer such questions as she chose not to answer. After both prosecution and defense had rested, the court—expressly declining to excuse defendant Yates as a witness in the case—submitted the issues of fact to the jury. The jury returned a verdict of guilty as to defendant Yates and others, a motion for a new trial was presented and denied. United States v. Schneiderman, D. C. S. Cal. 1952, 106 F. Supp. 906, judgment was pronounced, and an appeal from the judgment in the criminal case has been taken and is still pending.

Defendant Yates now moves to be released from custody under the civil contempt charge, basing her motion upon the ground that since the criminal trial is at an end there is no longer any reason why she should be coerced to answer.

Where as at bar a witness is imprisoned for civil contempt, "imprisonment * * * is not inflicted as a punishment, but is intended to be remedial by coercing the defendant to do what he had refused to do. * * * to coerce the defendant to do the thing required by the order for the benefit of the complainant. If imprisoned, as aptly said *In re* Nevitt (8 Cir.), 117 F. (448) 451, 'he carries the keys of his prison in his own pocket.' He can end the sentence and discharge himself at any moment by doing what he had previously refused to do." Gompers v. Bucks Stove & Range Co., 1911, 221 U. S. 418, 442, 31 S. Ct. 492, 498, 55 L. Ed. 797.

This power to coerce performance of legal duty is equitable in character. Gompers v. Bucks Stove & Range Co., *supra,* 221 U. S. at page 441, 451, 31 S. Ct. 492, 55 L. Ed. 797; Bessette v. W. B. Conkey Co., 1904, 194 U. S. 324, 327-329, 24 S. Ct. 665, 48 L. Ed. 997; *In re* Chiles, 1874, 22 Wall. 157, 168-169, 89 U. S. 157, 168-169, 22 L. Ed. 819. It exists for an equitable purpose, and duration of the power in a given instance is co-extensive with existence of the purpose. Gompers v. Bucks Stove & Range Co., *supra,* 21 U. S. at pages 451-452, 31 S. Ct. 492, 55 L. Ed. 797; *In re* Debs, 1895, 158 U. S. 564, 594-596, 15 S. Ct. 900, 39 L. Ed. 1092; *Ex parte* Kearney, 1822, 7 Wheat. 38, 45, 20 U. S. 38, 45, 5 L. Ed. 391; United States v. Hudson, 1812, 7 Cranch 32, 34, 11 U. S. 32, 34, 3 L. Ed. 259. That is to say, the power to imprison, in order to coerce an answer from a recalcitrant witness, endures so long as there remains reason to exercise the power in behalf of the litigant for whose benefit it is exerted. Harris v. Texas & Pacific Ry. Co., 7 Cir., 1952, 196 F. 2d 88, 90; 3 Bl. Comm. *444-445; 4 *id.* *283-288.

Hence, if the litigation in the criminal case as between the United States and defendant Yates were now at an end, the pending questions would of course be moot, and the reason for or object of coercive incarceration would have ceased to exist. United States v. United Mine Workers, 1947, 330 U. S. 258, 295, 67 S. Ct. 677, 91 L. Ed. 884; Gompers v. Bucks Stove & Range Co., *supra*, 221 U. S. at pages 441-442, 451-452, 31 S. Ct. 492, 55 L. Ed. 797; United States v. International Union, 88 U. S. App. D. C. 341, 190 F. 2d 865, 873-874; Parker v. United States, 1 Cir., 1946, 153 F. 2d 66, 71, 163 A. L. R. 379.

The defendant, urging that the court misapply the rule and thus shorten the time, advances the argument that termination of the trial—rather than termination of the litigation—marks an end to the value or usefulness of the testimony of a witness. In support of this contention the defendant cites cases in which the courts have declared that after discharge of a grand jury, Howard v. United States, 8 Cir., 1950, 182 F. 2d 908, 914, reversed on other grounds, 1950, 340 U. S. 898, 71 S. Ct. 278, 95 L. Ed. 651; Loubriel v. United States, 2d Cir., 1926, 9 F. 2d 807, 809; United States v. Collins, D. C. 1906, 146 F. 553, 554, or after adjournment of a legislature, Marshall v. Gordon, 1917, 243 U. S. 521, 542, 37 S. Ct. 448, 61 L. Ed. 881, there is no power to hold a witness in civil contempt of their authority.

But the analogy of a grand jury or legislature does not apply at bar. With respect to the latter, as the Court observed in Anderson v. Dunn, 1821, 6 Wheat, 204, 231, 19 U. S. *204, *231, 5 L. Ed. 242, "although the legislative power continues perpetual, the legislative body ceases to exist on the moment of its adjournment

* * * It follows that imprisonment (for civil contempt of that body) must terminate with that adjournment."

Likewise with respect to a grand jury. As Judge Learned Hand said in Loubriel v. United States, *supra*, 9 F. 2d at page 809: "Each investigation is separate and independent; it terminates with the grand jury which undertakes it, and the next does not take it up as unfinished business."

While one phase of the case of the United States against defendant Yates—a jury trial resulting in a verdict of guilty—is over, there still remains the pending appeal to the Court of Appeals, and possibly to the Supreme Court; and since the Court of Appeals has held "it appears that the case involves a substantial question which should be determined by the appellate court", Fed. Rules Crim. Proc. 46(a) (2); Order in Yates v. United States, 9 Cir., August 29, 1952, No. 13527, both the trial court and the United States must proceed here upon the assumption that either the Court of Appeals or the Supreme Court may order a new trial. 28 U. S. C., §2106.

If a new trial of the criminal case against the defendant Yates should be ordered, answers to the pending questions may become of great importance to the plaintiff for impeachment purposes, in the event defendant Yates should again choose to take the stand.

On the other hand, if defendant Yates should not elect again to take the stand, her entire testimony at the first trial might then be read to the jury by the plaintiff, either as admissions by the defendant, 2 Wharton, Criminal Evidence, §679 (11th ed. 1935); see Jackson v. State, 1925, 29 Okl. Cr. 429, 234 P. 228, 229; West v. State, 1922, 24 Ariz. 237, 208 P. 412, 416; People v. Thourwald, 1920, 46 Cal. App. 261, 189 P. 124, 126-127;

State v. King, 1917, 102 Kan. 155, 169 P. 557, 558, or under the reported-testimony exception to the hearsay rule. See Mattox v. United States, 1805, 156 U. S. 237, 240-244, 15 S. Ct. 337, 39 L. Ed. 409; Smith v. United States, 4 Cir., 1939, 106 F. 2d 726, 728; American Law Institute, Model Code of Evidence, Rule 511 (1942).

The defendant's testimony at the first trial being voluntarily given, no claim of privilege against self-incrimination as to such reported testimony could be raised. Caminetti v. United States, 1917, 242 U. S. 470, 493-495, 37 S. Ct. 192, 61 L. Ed. 442; United States v. Gates, *supra,* 176 F. 2d at page 79; see Johnson v. United States, 1943, 318 U. S. 189, 196, 63 S. Ct. 549, 87 L. Ed. 704; *cf.* Raffel v. United States, 1926, 271 U. S. 494, 46 S. Ct. 566, 70 L. Ed. 1054.

Thus it is clear that the answers now sought to be coerced from defendant Yates *qua* witness have undeterminable potential value to the plaintiff in the criminal case now pending on appeal. And it is equally clear that this potential value—as yet withheld because of the contumacious conduct of the witness—will continue to exist so long as the criminal case of the United States against Yates continues in the status of pending litigation.

Since the purpose of coercive imprisonment of a recalcitrant witness for civil contempt is aid to the litigant entitled to have the withheld information for the purposes of the pending case, Penfield v. S. E. C., 1947, 330 U. S. 585, 592, 67 S. Ct. 918, 91 L. Ed. 1117; McCrone v. United States, 1939, 307 U. S. 61, 64, 59 St. Ct. 685, 83 L. Ed. 1108, and since it appears beyond dispute that the United States is entitled to the answers of defendant Yates for the purposes of the criminal case in the event

another trial should be ordered, it must be held here that the object of coercive incarceration continues to exist, and with it the power of the court "to coerce the defendant to do the thing required by the order for the benefit of the complainant." Gompers v. Bucks Stove & Range Co., *supra,* 221 U. S. at page 442, 31 S. Ct. at page 498.

Both reason and policy argue this result. The imprisonment of defendant Yates, in the language of *In re* Nevitt, 8 Cir., 1902, 117 F. 448, 461, means nothing more than " 'commitment until the party shall make proper submission.' "

As was there said: " 'The law will not bargain with anybody to let its courts be defied for a specific term of imprisonment. There are many persons who would gladly purchase the honors of martydom in a popular cause at almost any given price, while others are deterred by a mere show of punishment. Each is detained until he finds himself willing to conform. This is merciful to the submissive, and not too severe upon the refractory. The petitioner, therefore, carries the key of his prison in his own pocket. He can come out, when he will * * *' "

Accordingly defendant Yates' motion to be released from custody for civil contempt must be and is hereby denied.

APPENDIX D.

United States Court of Appeals for the Ninth Circuit.

Oleta O'Connor Yates, Appellant, vs. United States of America, Appellee. No. 13,527. July 26, 1955.

Upon Appeal from the United States District Court for the Southern District of California, Central Division.

Before: Stephens, Fee and Chambers, Circuit Judges James Alger Fee, Circuit Judge:

Oleta O'Connor Yates was one of those indicted and on trial as a defendant on a charge of conspiracy to violate the Smith Act. After the close of the government case, all of the defendants rested except four, of whom Mrs. Yates was one. She was the only defendant there who testified. Yates vs. United States, 9 Cir., ... F. 2d ..... Upon cross-examination, she refused to answer any of four questions. Upon direction of the court to respondent, she still refused. Thereupon, the trial judge signed a certificate with four specifications setting up the refusals. A judgment was entered committing her to the custody of the Marshal for imprisonment "until such time as she may purge herself of the contempts by answering the questions ordered to be answered in each instance or until further order of the court." Notice of appeal from this order of June 26, 1952, was immediately filed. Defendant Yates continued under cross-examination for three days, during which time she refused to answer other like questions. She continued in custody during the rest of the trial. Upon conviction in the conspiracy case, she was confined with the other defendants until August 30, 1952. All of the others were then released upon posting bail.

The Marshal refused to release Mrs. Yates until the judge then presiding gave a specific order releasing her until the matter could be heard by the trial judge who had committed her for contempt originally. On September 3, 1952, the minutes recite that "defendant is ordered back into physical custody of the U. S. Marshal pursuant to the order of June 26, 1952, *re* civil contempt" and that a bench warrant issue. This order was passed by Hon. William Mathes, who had presided at the original trial. An appeal was taken from this order. Pending hearing, this Court stayed execution on the order and relieved Mrs. Yates of recommitment.

The confusion as to meaning of words existing here is blameworthy. There is no essential dichotomy between "civil" and "criminal" contempt. The power of the court is inherent and can only be removed when the court is abolished. This prerogative is based upon the federal Constitution. When "inferior courts" are created by Congress, each possesses this authority by virtue of its existence. The Supreme Court has expressly held that coercive measures to superinduce obedience and penalties for defiance may be imposed by the same court upon the same individual for the same act.[1] Indeed, the sanctions may be the same. Imprisonment which involves deprivation of personal freedom is applied indifferently. A fixed term or an indefinite one which might last longer seems to make no distinction of practical value to a prisoner. The judge might well take steps to release one no longer defiant who had been sentenced to a fixed term. Even the unexpressed purpose of the judge to coerce or punish

---

[1]United States vs. United Mine Workers, 330 U. S. 258, 296, 300.

is no test. As the maxim of equity, it serves the purpose of all who appeal to it. If we become involved in the bog of signification of phrases, the clear way will be lost.

Where the United States is prosecuting a criminal case, and a defendant as a witness refuses to answer after order by the court, it seems a contradiction in terms to call the refusal a "civil" contempt. The defiance of the order is committed in the face of the court. Procedural safeguards are thus unavailable and unnecessary.[2] The power of the court to proceed in an orderly manner is cardinal. The right of a defendant to testify in his own defense was formerly denied by the criminal courts of common law. Now, if he voluntarily takes the stand, under elaborate safeguards to prevent a coerced consent, a defendant may tell his own story in his defense. But this privilege, of inestimable value, is accorded upon the condition that he be cross-examined. Whether the purpose of the judge then be coercion or retribution, where a defendant has abused this privilege by refusal to testify in a criminal trial, the vindication of the authority of the tribunal is essential. The sanction, whether indefinite in duration or fixed in time, under such circumstances, has a strong flavor of punishment.

As to the primary order, there is no question. The trial court was well within the channels of power. It would be subversive of our system of trials, where a defendant is not compelled to testify, to permit him to testify voluntarily to that which he wishes and on the other hand refuse to answer on cross-examination any question which he might believe embarrassing. He cannot be compelled

---

[2]Of course, no such problem was here involved as developed in Offutt vs. United States, 348 U. S. 11.

to testify at all. No comment upon his failure to testify can be made by the prosecution—a feature which we sincerely hope is never eliminated from the federal system. But, where one waives this immunity and voluntarily gives testimony, he should not be permitted to pick and choose that which he will answer.

The questions here propounded were material, if not vital, to the main issue of conspiracy. Mrs. Yates had fair opportunity to answer, was expressly warned and refused with full knowledge of the consequences. The confinement as a result was proper exercise of the authority of the trial judge. The order of June 26, 1952, was valid.

It has, however, been now called to our attention that the trial at which the witness was ordered to testify has ended. This circumstance highlights the situation in the second appeal which was taken from the order of September 8, 1952, directing that Mrs. Yates be recommitted to custody, in accordance with the previous order, based upon the continued failure to testify. Termination of the original proceeding was a circumstance requiring consideration by the trial court before further action was taken. All concepts of the common law indicate a criminal trial is an entity. From ancient times, it was a proceeding before one judge and one jury. Even modernly, it has been held that the same judge was an essential to a criminal trial and another could not be substituted by consent of defendant and his counsel.[3] The doctrine of waiver has been invoked to permit less than the mystic twelve to sit as jurors and for substitutions of jurors to be made. It was not the avowed intention to

---

[3]United States vs. Freeman, 2 Cir., 227 Fed. 732.

change the guaranties by these innovations, and certainly no argument can be drawn that due process was subverted thereby.

In any event, once a verdict is returned and the jury is discharged, the trial is ended. Once so concluded, a trial is ended forever. The situation can never be re-created. This defendant, or some of the defendants or other people, may be retried on the same charge by the same judge and the same jury, but the trial is not the same. It is true, that, if we followed the analogies of civil cases, in which coercive measures in order to enforce the mandates of the court have been employed, the principle which was followed by the trial judge here would rule the proceeding.[4] So long as the private litigant, including the United States as a plaintiff in a civil case, can gain by coercive measures, the court is at liberty to use them even though the immediate trial may have come to an end.[5]

The trial court recognized that the only cases which involve this peculiar situation of prosecution by the United States are contrary to the position taken in this case. Where a witness has been called to testify before a grand

---

[4]Even in the cases where coercion is the entire objective, care must be exercised that the proceedings out of which the necessity for compulsion arose shall not have terminated. For even there, if the main proceeding is ended, the contempt is abated. Harris vs. Texas & Pacific Railway Co., 7 Cir., 196 F. 2d 88, 90; Parker vs. United States, 1 Cir., 153 F. 2d 66, 71; United States vs. International Union, D. C. Cir., 190 F. 2d 865, 874. And see United States vs. United Mine Workers of America, 330 U. S. 258; Gompers vs. Bucks Stove & Range Co., 221 U. S. 418, 451.

[5]The distinction lies in the continuance of the duty. The requirement that one produce records for an administrative body may be of indefinite continuance. No case has been cited to us indicating that the duty of a witness to answer even in a civil case extends beyond the discharge of the jury in the particular ca[illegible].

jury and the grand jury has been discharged,[6] the use of coercive measures upon the witness would be erroneous. The reason for this is obvious enough. The grand jury has gone out of session. The proceeding before the same body cannot be revived. If the witness were ordered to testify or wished to testify, there is no body before which the testimony could be received. Even if it were postulated that these answers were part of the original cross-examination, since the jury was discharged, the guarantee of the Constitution would apply to an answer then compelled. It is probable that the force of the oath which she took in that proceeding had been extinguished by the discharge of the jury. While it is true that perhaps the court might accept the acquiescence of the witness in giving the information under oath as a purging of the contempt, the situation cannot be recreated. This ending may be likened to the fall of the bridge. The bridge may be rebuilt, but it is not the same bridge. All the orders of a court requiring a person to cross the first bridge are vain once it has been swept away. The problem is more baffling than that faced by all the King's horses and all the King's men. This situation is even more dramatic in the trial of a defendant in a criminal case. There, concepts of jeopardy have sway.

This Court recognizes that the answers to the questions by Mrs. Yates may still be of great importance to the

---

[6]Howard vs. United States, 8 Cir., 182 F. 2d 908, 914, reversed on other grounds, 340 U. S. 898; Loubriel vs. United States, 2 Cir., 9 F. 2d 807, 809; United States vs. Collins (D. C.), 146 Fed. 553, 554.

government of the United States in this or other future criminal prosecution. It might be of great advantage if there were a retrial to have the information. Her attitude was contemptuous and defiant.[7] But, after the end of the trial, it was error to attempt to coerce this witness into testifying before a jury which had been disbanded and could not be legally recalled.

The order of June 26, 1952, was valid and is affirmed. It was error, however, to direct confinement thereunder after the close of the main trial. The order of September 8, 1952, is reversed.

Stephens, Circuit Judge, concurring.

I concur in the result.

(Endorsed:) Opinion and Concurring Opinion. Filed July 26, 1955. Paul P. O'Brien, Clerk.

---

[7]Even though the "petitioner * * * carries the key of his prison in his own pocket" and "can come out when he will" (*In re* Nevitt, 8 Cir., 117 Fed. 448, 461) does not render it less erroneous for the court to recommit when the duty to answer has been dissipated by discharge of the trial jury.

APPENDIX E.

United States v. Yates. Cr. No. 22467. United States District Court. S. D. California, C. D. Sept. 8, 1952.

Mathes, District Judge.

18 U. S. C., §401 declares that: "A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority * * * as * * * (3). Disobedience * * * to its lawful * * * order * * * or command."

Contempt of court is thus declared to be a public offense*—a crime; and Rule 42(a) of the Federal Rules of Criminal Procedure, 18 U. S. C. provides that: "A criminal contempt may be punished summarily if the judge certifies that he saw or heard the conduct constituting the contempt and that it was committed in the actual presence of the court." See Sacher v. United States, 1952, 343 U. S. 1, 9-11, 72 S. Ct. 451, *Id.*, 2 Cir., 1950, 182 F. 2d 416; MacInnis v. United States, 9 Cir., 1951, 191 F. 2d 157, certiorari denied, 1952, 343 U. S. 953, 72 S. Ct. 628; Hallinan v. United States, 9 Cir., 1950, 182 F. 2d 880, certiorari denied, 1951, 341 U. S. 952, 71 S. Ct. 1010, 95 L. Ed. 1375; United States v. Gates, 2 Cir., 1949, 176 F. 2d 78.

While on trial under an indictment charging conspiracy, 18 U. S. C., §371, to violate the Smith Act, 54 Stat. 670, 1940; 18 U. S. C., 1946 ed., §10; *id.* 1948 ed., §2385, defendant Oleta O'Connor Yates chose to take the witness stand in her own defense. Upon cross-examination she declined to answer certain questions, and repeatedly persisted in her refusal after being instructed by the court to answer.

The criminal trial was interrupted and a hearing had. 85 Tr. 11325-11354, 11367-11477. Upon this hearing counsel for the defense conceded that the questions which the defendant as witness blatantly refused to answer were properly put to her, and that "unquestionably this is exclusively within the court's sound discretion." See United states v. Toner, 3 Cir., 1949, 173 F. 2d 140, 144; Fed. Rules Crim. Proc. 52(a).

The court thereupon ordered the defendant committed "to the custody of the * * * Marshal * * * until such time as she * * * purge herself of the contempts by answering the questions ordered to be answered. * * *"

The criminal trial then proceeded, with the recalcitrant witness Yates continuing to testify and refusing to answer such questions as she chose not to answer. After both prosecution and defense had rested, the court—expressly declining to excuse defendant Yates as a witness in the case—submitted the issues of fact to the jury. The jury returned a verdict of guilty as to defendant Yates and others, a motion for a new trial was presented and denied United States v. Schneidermann, D. C. S. D. Cal. 1952, 106 F. Supp. 906, judgment was pronounced, and an appeal from the judgment in the criminal case has been taken and is still pending. The Court of Appeals has ordered defendant Yates released on $20,000 bail pending the appeal in the criminal case. See order in Yates v. United States, No. 13527, 9 Cir., August 29, 1952.

Defendant Yates thereafter moved to be released from custody under the civil contempt charge, basing her motion upon the ground that since the criminal trial is at an end there is no longer any reason why she should be coerced to answer.

This court denied the motion to release the defendant from coercive custody. See United States v. Yates, D. C. S. D. Cal. 1952, 107 F. Supp. 408. The defendant appealed and the Court of Appeals has ordered her release on $1,000 bail pending that appeal. See order Yates v. United States, No. 13535, 9 Cir., Sept. 5, 1952.

The United States now presents a motion to punish the witness Yates for criminal contempt by reason of her wilful disobedience to the orders of the court that she answer the unanswered questions.

(1) Where a witness is imprisoned for civil contempt, "Imprisonment * * * is not inflicted as a punishment, but is intended to be remedial by coercing the defendant to do what he had refused to do. * * * to coerce the defendant to do the thing required by the order for the benefit of the complainant. If imprisoned, as aptly said *In re* Nevitt (8 Cir.), 117 F. (448) 451, 'He carries the keys of his prison in his own pocket.' He can end the sentence and discharge himself at any moment by doing what he had previously refused to do." Gompers v. Bucks Stove & Range Co., 1911, 221 U. S. 418, 442, 31 S. Ct. 492, 498, 55 L. Ed. 797.

(2, 3) The power of a court to coerce performance of legal duty is equitable in character. Gompers v. Bucks Stove & Range Co. *supra,* 221 U. S. at page 441, 451, 31 S. Ct. 492, 55 L. Ed. 797; Bessette v. W. B. Conkey Co., 1904, 194 U. S. 324, 327-329, 24 S. Ct. 665, 48 L. Ed. 997; *In re* Chiles, 1874, 22 Wall. 157, 168-169, 89 U. S. 157, 168-169, 22 L. Ed. 819. It exists for an equitable purpose, and duration of the power in a given instance is co-extensive with existence of the purpose. United States v. United Mine Workers, 1947, 330 U. S. 254, 295, 67 S. Ct. 677, 91 L. Ed. 884; Gompers v. Bucks Stove

& Range Co., *supra,* 221 U. S. at pages 441-442, 451-452, 31 S. Ct. 492; *In re* Debs, 1895, 158 U. S. 564, 594-596, 15 S. Ct. 900, 39 L. Ed. 1092; *Ex parte* Kearney, 1822, 7 Wheat, 38, 45, 20 U. S. 38, 45, 5 L. Ed. 391; United States v. Hudson, 1812, 7 Cranch 32, 34, 11 U. S. 32, 34, 3 L. Ed. 259; Harris v. Texas & Pacific Ry. Co., 7 Cir., 1952, 196 F. 2d 88, 90; United States v. International Union, 88 U. S. App. D. C. 341, 190 F. 2d 865, 873-874; Parker v. United States, 1 Cir., 1946, 153 F. 2d 66, 71, 163 A. L. R. 379; 3 Bl. Comm. *444-445; 4 *id.* *283-288.

(4) This equitable power to imprison a recalcitrant witness in an effort to coerce an answer for the benefit of a litigant is not derived from the quoted provisions of 18 U. S. C. §401, but is an inherent power possessed from the beginning by federal courts in the exercise of their equity jurisdiction, which parallels that exercised by the English Court of Chancery at the time our Constitution was formed. See Sprague v. Ticonic Bank, 1939, 307 U. S. 161, 164-165, 59 S. Ct. 777, 83 L. Ed. 1184; Atlas Life Ins. Co. v. W. I. Southern, Inc., 1939, 306 U. S. 563, 568, 59 S. Ct. 657, 83 L. Ed. 987; Pennsylvania v. Wheeling Bridge Co., 1851, 13 How. 518, 563-564, 54 U. S. 518, 563-564, 14 L. Ed. 249; Boyle v. Zacharie, 1832, 6 Pet. 648, 658, 31 U. S. 648, 658, 8 L. Ed. 532.

(5) While the authorities speak of "civil" contempt and "criminal" contempt as if they were two entirely separate and distinct matters, the same act of disobedience usually constitutes both. In the last analysis, the distinction between the two depends entirely upon what power of the court is invoked against the contemnor.

(6) If coercive or compensatory power of the court is exerted upon the contemnor solely for the benefit of a litigant, such exercise of equity jurisdiction involves the civil power of the court, and hence the proceeding is termed

"civil" contempt. Matter of Christensen Eng. Co., 1904, 194 U. S. 458, 24 S. Ct. 729, 48 L. Ed. 1072; Worden v. Searls, 1887, 121 U. S. 14, 24-26, 7 S. Ct. 814, 30 L. Ed. 853.

(7) On the other hand, if the punitive or penal power of the court is exerted upon the Contemnor, the court's criminal power to punish for the commission of a public offense is necessarily invoked, 18 U. S. C. §§401, 402, and such a proceeding is called "criminal" contempt. Gompers v. Bucks Stove & Range Co., *supra,* 221 U. S. at pages 441-443, 31 S. Ct. 492; *In re* Debs, *supra,* 158 U. S. at pages 593-596, 15 S. Ct. 900; Savin *Ex parte,* 1889, 131 U. S. 267, 9 S. Ct. 669, 33 L. Ed. 150; Cuddy, *Ex parte,* 1889, 131 U. S. 280, 9 S. Ct. 703, 33 L. Ed. 154; *Ex parte Terry,* 1888, 128 U. S. 289, 9 S. Ct. 77, 32 L. Ed. 405; *cf. In re* Merchants' Stock & Grain Co., Petitioner, 1912, 223 U. S. 639, 32 S. Ct. 339, 56 L. Ed. 584; Doyle v. London Guarantee & Accident Co., 1907, 204 U. S. 599, 27 S. Ct. 313, 51 L. Ed. 641; Alexander v. United States, 1906, 201 U. S. 117, 26 S. Ct. 356, 50 L. Ed. 686; Beale, Contempt of Court, Criminal and Civil, 21 Harv. L. Rev. 11 (1908).

Thus the same act of contempt may result in invoking the equitable power of the court in an effort to coerce compliance, and also in invoking the criminal power of the court to impose a definite sentence of imprisonment by way of punishment. (Penfield Co. v. S. E. C., 1947, 330 U. S. 585, 590, 593-594, 67 S. Ct. 918, 91 L. Ed. 1117).

If, therefore, the equitable power of the court fails of its coercive purpose or cannot for some reason be invoked, *cf.* United States v. Yates, *supra,* Yates v. United States, *supra,* such a contingency is "without prejudice to the power and right of the court to punish contempt * * *." Gompers v. Bucks Stove & Range Co., *supra,* 221 U. S. at pages 451-452, 31 S. Ct. at page 502; Alexander v.

United States, *supra,* 201 U. S. at page k22, 26 S. Ct. 356; Bessette v. W. B. Conkey Co., *supra,* 194 U. S. at pages 327-334, 24 S. Ct. 665; *In re* Debs, *supra,* 158 U. S. at pages 593-594, 15 S. Ct. 900; *cf.* Michaelson v. United States *ex rel.,* 1924, 266 U. S. 42, 64-67, 45 S. Ct. 18, 69 L. Ed. 162.

And as Mr. Justice Lamar was moved to observe in the Gompers case, *supra,* 221 U. S. at page 450, 31 S. Ct. at page 501, "if, upon examination of the record, it should appear that the defendants were in fact and in law guilty of the contempt charged, there could be no more important duty than to render such a decree as would serve to vindicate the jurisdiction and authority of courts to enforce orders and to punish acts of disobedience. For while it is sparingly to be used, yet the power of courts to punish for contempts is a necessary and integral part of the independence of the judiciary, and is absolutely essential to the performance of the duties imposed on them by law. * * * If a party can make himself a judge of the validity of orders which have been issued, and by his own act of disobedience set them aside, then are the courts impotent, and what the Constitution now fittingly calls the 'judicial power of the United States' would be a mere mockery."

(8) For the reasons stated, the motion to invoke the criminal power of this court to punish the defendant Yates for contempt pursuant to 18 U. S. C. §401 and Rule 42(a) of the Federal Rules of Criminal Procedure is granted. A certificate of criminal contempt will be filed as provided in Rule 42(a), and an appropriate term of imprisonment imposed.

Appendix.

Certificate, Order and Judgment of Contempt.

(See R. 35, pp. 4-10.)

APPENDIX F.

United States Court of Appeals for the Ninth Circuit.

Oleta O'Connor Yates, Appellant, vs. United States of America, Appellee. No. 13,535. July 26, 1955.

Upon Appeal from the United States District Court for the Southern District of California, Central Division.

Before: Stephens, Fee and Chambers, Circuit Judges James Alger Fee, Circuit Judge:

The defendant Yates was on trial with others on a charge of conspiracy. She took the witness stand in her own defense. Upon cross-examination, she declined to answer four questions upon June 26, 1952, although repeatedly ordered by the court so to do. The trial of the criminal case was interrupted. A hearing was had. The trial judge committed the defendant Yates to the custody of the Marshal until she should purge herself of the contempt by answering these four questions. This Court has recently held this commitment ineffective after the trial of the criminal case had ended. Yates vs. United States, ... F. 2d .....

The criminal trial was then resumed. Defendant Yates was recalled to the stand. She thereafter, on June 30, refused to answer a series of eleven questions, although expressly directed to do so by the trial court.

Thereupon, the cause was submitted to the jury. A verdict of guilty was returned against defendant Yates and others. Judgment was pronounced on August 7, 1952. This conviction has been affirmed. Yates vs. United States, ... F. 2d .....

On August 8, 1952, the court sentenced defendant Yates to a term of one year's imprisonment on each of the eleven counts: said terms to run concurrently with each other but consecutively to the sentence of five years imposed in the main case. This Court has recently affirmed this judgment in criminal contempt.

On September 8, 1952, the government presented a motion to punish defendant Yates for criminal contempt, alleging her willful disobedience to the orders of the court on June 26 in the failure to answer the four questions, in default of which she had theretofore been committed to coercive custody. The court sentenced the defendant to a period of three years for each of the four separate contempts, the terms to commence and run concurrently, and commitment issued thereon. Defendant was taken into custody on September 8 and commenced service of this sentence. The court subsequently modified the judgment to provide that the terms of imprisonment were to take effect after the release of defendant from custody following service of the sentence in the main case.

Appeal has been taken from this order.

This situation is complex. To overcome the refusal of the defendant in a criminal case to answer these four questions, the court had committed her. While upon the witness stand during this confinement, Mrs. Yates had refused to answer eleven other questions of a similar nature, and was thereupon sentenced to imprisonment for a year as a punishment. This conviction has been upheld. It was expressly decided there that the two occasions were

separate and distinct, and different corrective and punitive measures were within the competence of the court.

If the trial judge, at the same time and as part of the same judgment, had imposed a coercive confinement for an indefinite period and punitive imprisonment for a fixed term thereafter[1] for failure to answer these four questions, perhaps the difficulty might have been dissipated. As has been heretofore pointed out, the confusion of the language, if not the underlying concepts,[2] complicates the situation where, as here, there are two judgments pronounced at different times.

The purpose of the judge in the first commitment is by no means clear because of the confusion in the authorities. It seems the vindication of the power of the tribunal and necessity of an example for the enlightenment of other suitors might well have entered the consciousness if not the volition of the judge. Such factors as well as coercion of defendant might have characterized the purpose of the court when decreeing the first confinement. The judgment may well have been punitive as well as coercive.

The trial court may have conceived that defendant had made up her mind not to answer the questions before she went on the stand. The severity of the sentence which is now under consideration can be justified upon the theory

---

[1]United States vs. United Mine Workers, 330 U. S. 258, 295.

[2]When a slightly different problem arises in this field, the authorities are of little help. See especially the main opinion, concurring opinion and dissenting opinion in Penfield Co. vs. Securities & Exchange Commission, 330 U. S. 585, 595, 603, and Sacher vs. United States, 343 U. S. 1.

that it was the intention of this defendant to achieve martyrdom by defying what she would probably characterize as the bourgeois institution of common law courts and to proclaim fanatic loyalty to the cause and at the same time by æsopian language set up humanitarian motives as a basis for her refusal. If the trial judge believed the consistent refusal was part of a concerted action to bring into disrepute the jury trial as an instrumentality of democratic government, then it was his duty to punish and ours to affirm.[3] Both courts must be meticulously careful to observe the safeguards, procedural and substantive.

It has already been intimated that there are serious dangers inherent in postponing a punitive sentence for contempt. But a judge in a criminal trial is in a dilemma which requires judgment almost superhuman to solve correctly. A punitive sentence for contempt upon a defendant in a criminal case might seriously prejudice his standing before the trial jury. The peculiar nature of proceedings for contempt permits temporary coercive measures followed by imprisonment for a fixed term as punishment.[4] But, while coercion is applied, the defendant in the criminal case is entitled to know he may yet be subjected to a definite penalty for contempt and that

---

[3]United States vs. Gates, 2 Cir., 176 F. 2d 78; United States vs. Green, 2 Cir., 176 F. 2d 169; United States vs. Winston, 2 Cir., 176 F. 2d 163. See also United States vs. Hall, 2 Cir., 198 F. 2d 726.

[4]There is no denial here that a criminal contempt is punishable in an independent proceeding divorced from the original cause, in the course of which it may have occurred.

the coercive restraint is not intended to relieve him of the punishment for the criminal refusals which he has already uttered.

In any event, the intellectual confusion noted prevents us from denominating the two periods of custody under two different judgments for the same four refusals as double jeopardy for the same acts. If then the record had shown a definite notification to defendant at an appropriate time, the coercive and punitive sanctions might have been successively applied. But the concept of due process of law is an additional safeguard. The notions inherent therein will not permit, without prior positive notification, what otherwise might be viewed as the indefinite confinement of a defendant in a criminal case pending his submission as a witness to authority, and then, when imprisonment has had no effect, the punishment of the refusal of obedience by incarceration for a term of years.[5]

Judgment reversed.

(Endorsed:) Opinion. Filed July 26, 1955.

Paul P. O'Brien, Clerk.

---

[5]Since proceedings in contempt are *sui generis*, here the whole course of action in the criminal trial and all the subsequent proceedings must be appraised.

APPENDIX G.

18 U. S. C., SECTION 401

Power of court

A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as—

(1) Misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice;

(2) Misbehavior of any of its officers in their official transactions;

(3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command. June 25, 1948, c. 645, 62 Stat. 701.

FEDERAL RULES OF CRIMINAL PROCEDURE—RULE 42

Criminal Contempt

(a) Summary Disposition. A criminal contempt may be punished summarily if the judge certifies that he saw or heard the conduct constituting the contempt and that it was committed in the actual presence of the court. The order of contempt shall recite the facts and shall be signed by the judge and entered of record.

(b) Disposition Upon Notice and Hearing. A criminal contempt except as provided in subdivision (a) of this rule shall be prosecuted on notice. The notice shall state the time and place of hearing, allowing a reasonable time for the preparation of the defense, and shall state the essential facts constituting the criminal contempt charged

and describe it as such. The notice shall be given orally by the judge in open court in the presence of the defendant or, on application of the United States attorney or of an attorney appointed by the court for that purpose, by an order to show cause or an order of arrest. The defendant is entitled to a trial by jury in any case in which an act of Congress so provides. He is entitled to admission to bail as provided in these rules. If the contempt charged involves disrespect to or criticism of a judge, that judge is disqualified from presiding at the trial or hearing except with the defendant's consent. Upon a verdict or finding of guilt the court shall enter an order fixing the punishment.

APPENDIX H.

Name of Case	Character of Offense	Sentence
Offutt v. United States, 208 F. 2d 842 (C.A.D.C. 1953)	Lawyer—Gross discourtesy to Court	Reduced from 10 days to 48 hours
Cooke v. United States, 267 U. S. 517	Scandalous letters and jury shadowing	30 days
Hoffman v. United States, 13 F. 2d 278 (C.A. 7, 1926)	Sheriff permitted prisoner to go at large	$200 fine
Hallinan v. United States, 182 F. 2d 880 (C.A. 9, 1950)	Lawyer—Deliberate disobedience of orders of Court	6 months
MacInnis v. United States, 191 F. 2d 157 (C. A. 9, 1951)	Lawyer—Abuse of Court	3 months
Huffman v. United States, 148 F. 2d 943 (C. A. 10, 1945)	Deliberate violation of injunction	$1,000 fine
McCann v. N. Y. Stock Exchange, 80 F. 2d 211 (C.A. 2, 1935)	Deliberate violation of injunction	$250 fine
In re Maury, 205 Fed. 626 (C. A. 9, 1913)	Lawyer—Disrespectful statements to Court	$500 fine
United States v. Landes, 97 F. 2d 378 (C.A. 2, 1938)	Lawyer—Disrespect and disobedience of orders of Court	$50 fine
In re Gompers, 40 App. D.C. 293, 337	Deliberate violation of injunction	30 days for one def't.; $500 each for two other defendants
Western Fruit Growers v. Gotfried, 136 F. 2d 98 (C.A. 9, 1943)	Deliberate violation of injunction	$1,000, $500, $250 fines, respectively
United States v. Sacher, et al., 343 U.S. 1	Lawyers—Abuse and disrespect	6 months, 4 months, 30 days, respectively
Tosh v. W. Ky. Coal Co., 252 Fed. 44 (C.A. 6, 1918)	Deliberate violation of injunction	60 days
Russell v. United States, 86 F. 2d 389 (C.A. 8, 1936)	Deliberate interference with enforcement of writ	4 months
Penfield Co. v. Sec. & Ex. Comm., 330 U.S. 585	Refusal to produce books	$50 fine
In re Stein, 7 F. 2d 169 (D.C. N.D. Calif., 1925)	Refusal of bankrupt to be examined	3 months
Duell v. Duell, 178 F. 2d 683 (C.A.D.C., 1948)	Refusal to produce books	30 days
Levinstein v. E. I. DuPont de Nemours & Co., 258 Fed. 662 (D.C. Del., 1919)	Refusal to obey subpoena	$500 fine